CFMEU
CONSTRUCTION

FAIR WORK COMMISSION STATEMENT OF PRINCIPLES ON GENUINE AGREEMENT

SUBMISSION OF THE CFMEU CONSTRUCTION AND GENERAL DIVISION

1. The Construction and General Division of the Construction, Forestry, Maritime, Mining and Energy Union (**the CFMEU**) welcomes this opportunity to make a submission on the draft Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 (the **Draft Statement)** published by the Fair Work Commission (the **Commission**) on 3 March 2023.

2. The CFMEU has reviewed, in draft form, the amendments to the Draft Statement proposed by the ACTU. The CFMEU supports those proposed amendments.

3. The matters set out below are intended to supplement those raised by the ACTU.

CFMEU opposes reduction and fragmentation of genuine agreement protections

4. The current, prescriptive pre-approval requirements for enterprise agreements under Division 4 of Part 2-4 of the *Fair Work Act 2009* (Cth) (**FW Act**) provide valuable protections to employees in bargaining.

5. The CFMEU opposes any reduction of those protections.

6. The CFMEU vehemently opposed the former Coalition government's attempt to weaken the pre-approval requirements via the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**Omnibus Bill**).[1] As the CFMEU and MUA said in the Omnibus Bill Submission:

> *the importance of section 180 and the obligations contained therein cannot be gainsaid – they are designed to ensure employees are fully informed and in the best possible position to determine whether to accept the terms proposed by their employer or return to the bargaining table. The existing section 180 is integral to the fair operation of Australia's enterprise bargaining regime …*

7. Likewise, when the former Coalition government amended the Fair Work Regulations 2009 (Cth) to cut the 'access period' for votes to approve variations to enterprise agreements from seven days to just one,[2] the CFMEU sued the government in the

[1] See CFMEU and MUA, 'Worse Off Overall: Submission to the Senate Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020' (**Omnibus Bill Submission**) at [64]-[96].
[2] See Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020.

Federal Court, arguing the change to the access period was unlawful.[3] The day before the Federal Court was due to hand down its judgment, the Coalition government backflipped and restored the 7-day access period.

8. The CFMEU, accordingly, also opposes any reduction of the pre-approval requirements made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**).

9. According to the Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Original EM**), it was originally intended that the pre-approval requirements of, eg, ss 180(2), (3) and (5)

> *be subsumed within the overarching requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by employees.*[4]

10. The removal of those requirements, according to the Original EM, was "intended to provide greater flexibility without reducing employee safeguards",[5] given the ongoing requirement of "genuine agreement".

11. This is a contradiction in terms. It is impossible to provide "greater flexibility", specifically by removing statutory rules that are designed to safeguard employees' participation in the agreement making process, without "reducing employee safeguards".

12. It is also an unnecessary reform. As the Commission's *Discussion paper: Statement of principles on genuine agreement* (**Discussion Paper**) acknowledges, s 188(2) of the FW Act has, since December 2018, provided the Commission with sufficient flexibility to address minor procedural and technical errors in employers' compliance with the pre-approval requirements, while retaining employee protections in cases where the employer's non-compliance was likely to disadvantage employees.[6]

13. As the Discussion Paper indicates, the introduction of s 188(2) has coincided with a 75% reduction in the incidence of enterprise agreements that are rejected for approval by the Commission (from a "high" of only 2% in July-December 2018, to an insignificant 0.5% in July-December 2022). It has also coincided with an 86% reduction in the incidence of agreement approval applications that are withdrawn by the employer prior to decision (from 18% in July-December 2018, to 2.5% in July-December 2022).[7]

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[3] CFMMEU v Minister for Industrial Relations, Federal Court proceeding number NSD 499 of 2020.
[4] Original EM at [691]. See also the Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Revised EM**) at [712].
[5] Original EM at [695].
[6] Discussion Paper at [23].
[7] Ibid at [23] Chart 1: "s 185 applications by result type".

14. These figures, along with the timeliness statistics reported in the Discussion Paper,[8] make clear that the frequently repeated claim by employer groups "that enterprise bargaining has become far too complicated and costly"[9] has no basis in fact, and is in truth a political campaign.

15. Given the other reforms made by the SJBP Act, and the Albanese government's public statements about them,[10] it is perplexing that this political campaign has been allowed to determine the SJBP Act's changes to the enterprise agreement approval process.

16. Indeed, in a bizarre parallel with the Coalition's Omnibus Bill,

> *it appears that the Federal Government has accepted claims by employer associations that pre-approval steps … are mere administrative technicalities that are preventing agreements being certified.*[11]

17. Given those contradictions, it is a step in the right direction that the requirement under s 180(5) for employers to take all reasonable steps to explain the terms of the proposed agreement, and the effect of those terms, to employees, in a manner that takes into account their particular circumstances — originally proposed to be removed — has been retained.

18. It is also a step in the right direction that the Draft Statement effectively reproduces the requirements of ss 180(2) and (3) in relation to the provision of 7 days' notice of the time, place and method of the vote to approve a proposed enterprise agreement, and the provision of copies of the proposed agreement and any material incorporated by reference in the proposed agreement.

19. The incoherent policy of the SJBP Act is described elsewhere in the Original and Revised EMs as "moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement".[12]

20. The so-called "principles-based approach" is implemented in a fragmented and inconsistent fashion by the SJBP Act. Most (but not all) of the current prescriptive pre-approval requirements are retained in relation to enterprise agreements covering a

[8] See at [24] and Table 1: "Time taken to approve and number of s 185 applications".
[9] See, for example, Letter from Steve Knott AM, Chief Executive, Australian Resources and Energy Employer Association, to the Hon Anthony Albanese MP and the Hon Tony Burke MP, May 2022.
[10] See the Hon Tony Burke MP, Minister's Second Reading Speech for the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023: "Secure Jobs, Better Pay was about raising the bar—raising the bar on awards, raising the bar on enterprise agreements, raising the bar on bargaining and lifting the floor for workers."
[11] Omnibus Bill Submission at [69].
[12] Original EM at [717]; Revised EM at [742].

single employer. A greater proportion of those requirements — but, again, not all of them — are removed in relation to multi-employer agreements.

21. The Original and Revised EMs do not identify a rationale for this differential treatment.[13] Given the policy of expanding the multi-employer agreement scheme is to increase agreement coverage and improve working conditions for employees who have historically been excluded from improving their working conditions through single-employer bargaining, it is difficult to see what rationale there could be for reducing employee protections in the multi-employer context.

22. In this respect, it is a step in the right direction that the Draft Statement effectively reproduces the requirements of ss 173 and 174 with respect to the requirement to provide notice of bargaining, and employees' rights to be represented in bargaining, in respect of multi-employer enterprise agreements.

23. However, this and each of the other "steps in the right direction" referred to above involve nothing more than the retention, or approximation, of the pre-existing employee protections in Division 4 of Part 2-4. This is clearly an unsatisfactory approach to legislative reform, particularly given the statement of principles is not intended to create new rights or obligations.[14]

24. It is also difficult to see how replacing well-understood, clear, statutory provisions with the amorphous, overarching requirement that agreements be genuinely agreed, could be said to simplify the approval process.[15] Nor is there any discernible basis for the radically separate treatment of the genuine agreement requirements compared to the other pre-approval requirements of s 186 (eg, the "fairly chosen" requirement).

25. The interpretation of the new provisions is uncertain, as the Discussion Paper notes.[16] It is virtually guaranteed that there will be a flood of litigation about their meaning, and it will be years before the courts arrive at a settled interpretation of them. It is also likely that the fragmented approach to genuine agreement established by the SJBP Act will result in a fragmented set of employee protections, and greater complexity rather than less.

26. The existing agreement approval regime created by Division 4 of Part 2-4 of the FW Act is complex. But that complexity is justifiable in order to protect the rights of employees, given the imbalance in bargaining power between employers and employees. What is not justifiable is the creation of additional uncertainty and complexity without any corresponding improvement to the protection of employees.

[13] See, eg, Original EM at [26], [707]; Revised EM at [27], [731].
[14] Original EM at [717]; Revised EM at [742].
[15] Cf Original EM at [24]; Revised EM at [25].
[16] At pages 32-33.

Draft Statement provides limited guidance to parties

27. According to the Original and Revised EMs, the statement of principles which the Commission is required to make by the new s 188B:

> *will guide parties as to **how the FWC will consider particular issues** when determining whether the proposed enterprise agreement has been 'genuinely agreed'. These scenarios could include issues such as whether bargaining genuinely occurred prior to voting and whether employee organisation bargaining representatives were appropriately involved in bargaining.*[17]

28. In this way, the statement of principles is "intended to assist parties" in a way that is "largely explanatory and facilitative (i.e. directed at assisting persons to comply with the new provisions)".[18]

29. Therefore, the Commission's task in making the statement of principles is, first, to identify the relevant principles, and second, to explain how the Commission will apply those principles in a particular case, in a way that assists parties to Commission proceedings and facilitates their compliance with the requirements of the legislation.

30. Given that statutory mandate, it is not clear why the Draft Statement only contains a bare statement of the relevant principles, along with some general, abstract discussion about what the principles require. In other words, in the Draft Statement, the Commission has taken the first step that was required, but not the second.

31. That discussion largely restates the existing (or soon-to-be repealed) statutory provisions and does not deal with either of the scenarios listed in the above extract from the Original and Revised EMs. It also does not address the application of s 188(2) (to be renumbered s 188(5)) to "minor procedural or technical errors" with respect to the genuine agreement requirements, or the extent to which an employer may address non-compliance with the genuine agreement requirements by giving an undertaking under s 190.

32. This approach is all the more surprising given the Commission's long-established practice of publishing Benchbooks containing detailed commentary on the FW Act and other relevant legislation, as well as court and tribunal decisions interpreting them. Those Benchbooks include the Commission's Benchbook on the enterprise agreement making process, which traverses much of the territory that the statement of principles is required to cover.

[17] Original EM at [716]; Revised EM at [741].
[18] Original EM at [717]; Revised EM at [742].

33. Those Benchbooks have their genesis in the unfair dismissal benchbook maintained by the Commission for use by Commission members. The Commission's purpose in making that benchbook publicly available online was "so that parties can access relevant decisions to assist them in presenting their case to the [Commission]".[19]

34. Consistently with that purpose, the material included in the Benchbooks provides a useful source of guidance to parties to proceedings before the Commission as to the relevant principles, and how the Commission will consider particular issues in a given case. With respect, it is this guidance that is missing from the Draft Statement.

35. We suggest, therefore, that the Draft Statement be amended to include additional guidance, commentary on the legislative provisions, and references to the decided cases, so that it more closely resembles the Benchbooks.

36. That additional guidance should include (without limitation):

    a. Where the timing of the 7-day access period is manipulated by the employer to minimise the number of working days falling within the period (for example, by scheduling the vote to occur immediately following consecutive long weekends) and thereby limit the capacity of employees to discuss issues collectively and limit the capacity of unions to provide advice to employees, this is inconsistent with the employer's good faith bargaining obligations: *Lendlease Engineering Pty Limited* [2017] FWC 3080 at [60]-[62].

    b. A "voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer" includes that the ballots provided to employees not be marked with the name of the employee to whom they are issued. Doing so is likely to make employees feel improperly pressured to vote a certain way. An employer concerned to ensure that each employee votes only once may do so by marking employees' names off a list when they are given a ballot: *Geocon Constructors (ACT) Pty Ltd t/a Geocon* [2020] FWCA 3126 at [35]-[36].

    c. Giving employees "a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner" includes providing employees with copies of material incorporated in the agreement: *Bachy Soletanche Australia Pty Ltd* [2019] FWC 4042 at [49].

    d. An employer must provide a proper explanation of proposed agreement terms that involve material differences compared to the relevant Award or predecessor agreement. An employer that gives no or minimal explanation of

[19] Fair Work Australia (2012), *Future Directions for Australia's National Workplace Relations Tribunal: Our Plan for the Year Ahead*, at page 3.

terms in this category fails to discharge the obligation in s 180(5): *BGC Contracting Pty Ltd* [2018] FWC 1466 at [99]; *Master Builders' Association of New South Wales* [2021] FWC 1016 at [35]; *Master Builders' Association of New South Wales* [2021] FWC 1267 at [25]; *Master Builders' Association of New South Wales* [2021] FWC 1425 at [26]; *Master Builders' Association of New South Wales* [2021] FWC 1509 at [26].

CFMMEU
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